

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL DALY, SHARON LEIFER, AND
DANIEL J. BROWN, ON THEIR BEHALF
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs,

v.

UNITRIN, INC, A FOREIGN INSURER;
SAFECO INSURANCE COMPANY OF
ILLINOIS, A FOREIGN INSURER; AND
CCC INFORMATION SERVICES INC., A
FOREIGN INSURER,

Defendants.

No. CV-07-0384-EFS

**ORDER GRANTING PLAINTIFFS AND
UNITRIN'S MOTIONS AND
GRANTING AND DENYING IN PART
SAFECO AND CCC'S MOTIONS**

Before the Court, without oral argument, are Defendant Unitrin, Inc.'s Motion to Dismiss (Ct. Rec. 6), Defendant Safeco Insurance Company of Illinois' ("Safeco") Motion to Dismiss (Ct. Rec. 12), Defendant CCC Information Services, Inc.'s Motion to Dismiss ("CCC") (Ct. Rec. 22), and Plaintiffs' Motion to Dismiss Unitrin and to Permit Amendment to Complaint to Substitute Financial Indemnity Company as a Defendant (Ct. Rec. 29). After reviewing the submitted materials and applicable authority, the Court is fully informed. For the reasons given below, the Court grants Plaintiffs' and Unitrin's motions and grants and denies in part Safeco's and CCC's motions.

A. Unitrin's and Plaintiffs' Motions to Dismiss

Given Plaintiffs and Unitrin's agreement, the Court grants Plaintiffs leave to amend the Complaint to substitute Financial

1 Indemnity Company, in place of Unitrin, as a Defendant. Accordingly,
2 Plaintiffs' and Unitrin's motions are granted. Plaintiff shall file
3 the amended complaint (Ct. Rec. 29-3) within five (5) after this Order
4 is entered.

5 **B. Safeco's and CCC's Motions to Dismiss**

6 Safeco and CCC (collectively hereinafter, "Defendants") ask the
7 Court to dismiss Plaintiffs'¹ Complaint pursuant to Federal Rule of
8 Civil Procedure 12(b)(6) for failure to state (1) a Washington Consumer
9 Protection Act cause of action and related injunctive-relief claim, (2)
10 a negligent misrepresentation cause of action, and (3) a civil
11 conspiracy cause of action. Plaintiffs contend the Complaint is
12 sufficient as plead.

13 1. Standard

14 A motion to dismiss under Rule 12(b)(6) tests the legal
15 sufficiency of the pleadings. *Navarro v. Block*, 250 F.3d 729, 731 (9th
16 Cir. 2001). A complaint may be dismissed for failure to state a claim
17 under Rule 12(b)(6) where the factual allegations do not raise the
18 right to relief above the speculative level. *Bell Atl. v. Twombly*, 127
19 S. Ct. 1955, 1965 (2007). Conversely, a complaint may not be dismissed
20 for failure to state a claim where the allegations plausibly show that
21 the pleader is entitled to relief. *Id.* In ruling on a motion pursuant
22 to Rule 12(b)(6), a court must construe the pleadings in the light most
23 favorable to the plaintiff and must accept all material allegations in
24 the complaint, as well as any reasonable inferences drawn therefrom.

25 ¹ Because Plaintiff Daly is not asserting individual claims
26 against Safeco, Safeco is not seeking dismissal of Daly's claims.

1 *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003); see also *Chang v.*
2 *Chen*, 80 F.3d 1293 (9th Cir. 1996). Motions to dismiss are viewed with
3 disfavor and are rarely granted. *Hall v. City of Santa Barbara*, 833
4 F.2d 1270 (9th Cir. 1986).

5 2. Washington Consumer Protection Act (CPA)

6 The parties disagree as to what type of CPA claim the Complaint
7 alleges - a *per se* deceptive trade practice CPA claim or a non-*per se*
8 deceptive trade practice CPA claim. Defendants argue the Complaint
9 alleges a *per se* deceptive trade practice CPA claim and, because
10 Plaintiffs are not Defendants' insureds, they lack standing to bring
11 such a CPA action. Although Plaintiffs maintain they are not pursuing
12 a *per se* deceptive trade practice claim, the Court concludes the
13 Complaint alleges both a *per se* deceptive trade practice claim and a
14 non-*per se* deceptive trade practice CPA claim; however, "non-insured"
15 Plaintiffs may only maintain the non-*per se* deceptive trade practice
16 CPA claim.

17 a. *CPA Elements*

18 In Washington, a successful CPA plaintiff must satisfy the
19 following five elements: (1) an unfair or deceptive act or practice,
20 (2) occurring within trade or business, (3) affecting the public
21 interest, (4) injuring the plaintiff's business or property, and (5) a
22 causal relation between the deceptive act and the resulting injury.
23 RCW 19.86.020; *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151 (2007)
24 (citing *Hangman Ridge Training Stables v. Safeco*, 105 Wn.2d 778
25 (1986)). Cases discuss two types of CPA claims: a *per se* deceptive
26 trade practice claim and non-*per se* deceptive trade practice CPA claim.

1 A non-*per se* deceptive trade practice CPA claim is proven by
2 establishing facts that satisfy each individual CPA element. *Hangman*
3 *Ridge*, 105 Wn.2d at 785-86; *Pain Diagnostics*, 97 Wn. App. at 698-99.
4 In a *per se* deceptive trade practice CPA claim, a plaintiff satisfies
5 the first two elements, i.e. (1) an unfair or deceptive act or practice
6 (2) occurring within trade or business, by proving a violation of a
7 statute or regulation that the Washington legislature has labeled an
8 unfair or deceptive business act or practice, such as insurance
9 statute, RCW 48.30.010(1), or insurance regulations, WAC 284-30-300, -
10 400. *Hangman Ridge*, 105 Wn.2d at 785-86; *Pain Diagnostics &*
11 *Rehabilitation Assocs. v. Brockman*, 97 Wn. App. 691, 698 (1999). The
12 *per se* deceptive trade practice claim plaintiff must then also
13 establish the last three (3) CPA elements independently.

14 b. *Per Se* Deceptive Trade Practice CPA Claim

15 Plaintiffs maintain that they are not asserting a *per se* deceptive
16 trade practice CPA claim. The Complaint, however, asks the Court to:
17 "[d]eclare that defendants' policies and practices of evaluating total
18 loss settlement values, as they currently exist, are contrary to the
19 laws of the state of Washington because they are in violation of RCW
20 48.01.030 and RCW 19.96 *et seq.*" These are insurance statutes. As
21 noted above, the Washington legislature has labeled insurance statute
22 violations as *per se* unfair or deceptive acts or practices occurring
23 within trade or business. Accordingly, when this declaratory judgment
24 request is viewed with the remainder of the Complaint, the Complaint
25 states a *per se* deceptive trade practice CPA claim.

26 However, to assert an insurance statute violation, the plaintiff

1 must be an insured of the insurance company. See *Pain Diagnostics*, 97
2 Wn. App. 697-98; *Tank v. State Farm Fire & Cas. Co.*, 105 Wn. 2d 381,
3 393-94 (1986); *Dussault v. Am. Int'l Group*, 123 Wn. App. 863, 867
4 (2004). Plaintiffs are not insureds of Safeco or Unitrin; therefore,
5 Plaintiffs cannot rely upon RCW 48.01.030, or other insurance statutes
6 or regulations, as a basis for relief against Defendants.

7 c. *Non-Per Se Deceptive Trade Practice CPA Claim*

8 Defendants maintain that the Complaint fails to allege a non-per
9 se deceptive trade practice CPA claim, relying upon *Green v. Holm*, 28
10 Wn. App. 135 (1981). The Court finds *Green* unconvincing because the
11 complaint in *Green* did not set forth the five elements of a CPA
12 violation but rather generally claimed that the insurer violated the
13 CPA and WAC 284-30-300 *et seq.* In addition, unlike Plaintiffs who wish
14 to pursue only a non-per se deceptive trade practice CPA claim, the
15 plaintiffs in *Green* desired to bring a per se deceptive trade practice
16 CPA.

17 Defendants also argue "non-insured" Plaintiffs lack standing to
18 bring a non-per se deceptive trade practice CPA claim against
19 Defendants. As noted above, in order to prove a non-per se deceptive
20 trade practice CPA claim, Plaintiffs must establish that each of the
21 five (5) CPA elements is satisfied. The Complaint alleges:

22 12.2 Defendants' false representations to the class were
23 unfair and deceptive acts occurring in trade or commerce.

24 12.3 Defendants' practice of utilizing false and deceptive
25 representations in the settlement of total losses has a
26 substantial adverse impact on the public interest.

12.4 Defendants' total loss settlement practices have caused
damage to the class members who accepted less than full
compensation for their totaled vehicles based on the

1 misrepresentations of defendants.

2 (Ct. Rec. 1.) The Court finds the Complaint clearly sets forth facts
3 to support elements one, four, and five: (1) deceptive acts that (4)
4 caused (5) injury to Plaintiffs. The Court addresses below the second
5 element - trade or commerce- and the third element - public interest.
6 Inherent in the Court's discussion of these elements is whether "non-
7 insured" Plaintiffs have standing to pursue a non-per se deceptive
8 trade practice CPA claim against Defendants because "[t]he concerns
9 that typically underlie the issue of 'standing' are already addressed
10 by [satisfying the CPA] elements." *Stephens*, 138 Wn. App. at 176.

11 The Washington Supreme Court did not address whether a non-insured
12 asserting a non-per se deceptive trade practice CPA claim has standing
13 in *Tank* because the plaintiffs did not allege a non-per se deceptive
14 trade practice CPA claim. 105 Wn. 2d at 394. And the Washington Court
15 of Appeals in *Pain Diagnostics* explicitly declined to analyze this
16 issue because the plaintiff failed to cite any authority to support its
17 argument that it may maintain a non-per se deceptive trade practice CPA
18 claim. 97 Wn. App. at 698-99. In *Stephens v. Omni Insurance Co.*,
19 however, the Washington Court of Appeals discussed whether a consumer
20 transaction is required in order to satisfy the trade or commerce
21 element. 138 Wn. App. 151, 174-76 (2007). In *Stephens*, the issue was
22 whether an uninsured motorist allegedly at fault could bring a CPA
23 claim against a collection agency that was sending notices on behalf of
24 an insurance company to recover on its subrogation interests. After
25 ruling that a consumer relationship is not necessary to have standing
26 to bring a CPA claim, the Washington Court of Appeals stated:

1 "[b]ecause [the collection agency] conducts commerce with [the
2 insurers], and their commerce directly or indirectly affects people of
3 the State of Washington including insured drivers, we conclude that
4 [the collection agency's] practice of sending the notices is one that
5 occurred in trade or commerce." *Id.* at 176. The court emphasized that
6 the CPA allows "[a]ny person who is injured in his or her business or
7 property by a violation of RCW 19.86.020 . . . may bring a civil action
8 in superior court." RCW 19.86.090 (emphasis added).²

9 Here, Safeco and Unitrin represented its insureds, who were
10 involved in motor vehicle accidents with Plaintiffs, during the
11 adjustment of property damage claims. To assist with the valuation of
12 the property damage claims, Safeco and Unitrin hired CCC to evaluate
13 and appraise the property loss. Although Plaintiffs are not consumers
14 of either CCC's services or insureds of Safeco and Unitrin, the Court
15 concludes Plaintiffs have standing to pursue non-*per se* deceptive trade
16 practice claims against Defendants. The terms "trade" and "commerce"

17
18 ² The Court recognizes that in 1979 the Washington Court of
19 Appeals upheld dismissal of a CPA claim brought by a non-insured
20 against an insurance company because an adversarial relationship,
21 not a consumer relationship, was involved. *Marsh v. Gen. Adjustment*
22 *Bureau*, 22 Wn. App. 933. However, the case relied on in *Marsh -*
23 *Bowe v. Eaton*, 17 Wn. App. 840 (1977) - has been eroded by later
24 cases. See *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons*
25 *Corp.*, 122 Wn.2d 299, 312 (1993). Accordingly, the Court relies
26 upon the more recent *Stephens* decision.

1 as used in the CPA are to be construed broadly. *Stephens*, 138 Wn. App.
2 at 173. After construing these terms broadly and the pleadings in a
3 light favorable to Plaintiffs, the Court finds the Complaint contains
4 adequate allegations that Defendants' alleged deceptive acts involved
5 "commerce directly or indirectly affecting the people of the state of
6 Washington." RCW 19.86.010(2).

7 To satisfy the third element, Plaintiffs must allege facts
8 "show[ing] that the acts complained of affect the public interest."
9 *Hangman Ridge*, 105 Wn.2d at 788; see *Stephens*, 138 Wn. App. at 177
10 (setting out the different consumer-transaction and private-dispute
11 factors to consider when determining whether the public interest
12 element is met). Plaintiffs bring these CPA actions arguably based on
13 private disputes, rather than consumer transactions. But as *Stephens*
14 explains, "[n]o one [consumer-transaction or private-dispute] factor
15 is dispositive, nor is it necessary that all be present. . . . In some
16 cases the public interest element may be satisfied even though a 'neat
17 distinction between consumer and private dispute is not workable.'" 138
18 Wn. App. 177-78 (citations omitted). "However the dispute arises, 'it
19 is the likelihood that additional plaintiffs have been or will be
20 injured in exactly the same fashion that changes a factual pattern from
21 a private dispute to one that affects public interest.'" *Id.* at 178
22 (quoting *Hangman Ridge*, 105 Wash. 2d at 790). Here, Defendants'
23 alleged conduct - that they falsely represented to Plaintiffs the value
24 of their vehicles -, in the context of a Rule 12(b)(6) motion, are
25 sufficient to satisfy the public interest element of the CPA five-part
26 test.

1 Because the Court finds the Complaint alleges sufficient facts to
2 support the five (5) elements of a non-per se deceptive trade practice
3 CPA claim against Defendants, the Court finds Plaintiffs have standing
4 to bring this claim; Defendants' motions are denied in part.

5 d. *Summary*

6 In summary, the Court grants Defendants' motion to the extent the
7 Complaint alleges a *per se* deceptive trade practice CPA claim or relies
8 upon Washington insurance statutes or regulations to support the
9 requested relief under the CPA, negligent misrepresentation, or civil
10 conspiracy causes of action, and denies Defendants' motion to dismiss
11 the non-per se deceptive trade practice CPA cause of action.

12 2. Negligent Misrepresentation

13 Defendants ask the Court to dismiss Plaintiffs' negligent
14 misrepresentation cause of action because Defendants do not owe
15 Plaintiffs any legal duty and Plaintiffs failed to allege facts to
16 support the "justifiable reliance" element.

17 Washington utilizes the Restatement (Second) of Torts with respect
18 to negligent misrepresentation. *ESCA Corp. v. KPMG Peat Marwick*, 135
19 Wn. 2d 820, 826 (1998). Section 552(1) recognizes a negligent
20 misrepresentation cause of action based on an affirmative
21 misrepresentation. RESTATEMENT (SECOND) OF TORTS § 552; see *Westby v.*
22 *Gorusch*, 112 Wn. App. 558 (2002); *Dussault v. Am. Int'l Group*, 123 Wn.
23 App. 863, 871 (2004); *Colonial Imports v. Carlton N.W.*, 121 Wn. 2d 726
24 (1993). One of the necessary elements is justifiable reliance upon
25 the information given. RESTATEMENT (SECOND) OF TORTS § 552.

26 The Complaint alleges a number of affirmative misrepresentations

1 by Safeco, Unitrin, and CCC and also alleges that each Plaintiff
2 "justifiably relied on the information provided by Safeco [or Unitrin]
3 and CCC and did not receive full value for [their] car." (Ct. Rec. 1
4 ¶¶ 4.11; 5.11; 6.9.) The Court finds Plaintiffs sufficiently pleaded
5 facts to state an affirmative negligent misrepresentation cause of
6 action. Whether Plaintiffs have sufficient evidence to create a
7 genuine issue of material fact of justifiable reliance on the alleged
8 misrepresentations is a matter for summary judgment.³ See *Condor*
9 *Enterps. v. Boise Cascade Corp.*, 71 Wn. App. 48, 52 (1993); *Dohrer v.*
10 *Wakeman* 14 Wn. App. 157, 164 (1975). Accordingly, Defendants' motions
11 are denied in part.⁴

12
13 ³ Because *Myers v. Travelers Property Casualty Corp.*, No 00
14 CH 2793 (Cook Cty Cir. Ct. Sept 28, 2001), is unpublished, the
15 Court will not consider it. LR 7.1(g)(2). Counsel for CCC's use
16 of an unpublished opinion is both surprising and inappropriate, but
17 the Court will not impose sanctions on this occasion.

18 ⁴ This conclusion does not conflict with the Court's CPA
19 rulings. In *Indoor Billboard/Washington v. Integra Telecom of*
20 *Washington*, the Washington Supreme Court addressed the CPA
21 causation element and concluded that a CPA plaintiff need not prove
22 justifiable reliance but rather "must establish that, but for the
23 defendant's unfair or deceptive practice, the plaintiff would not
24 have suffered an injury." 162 Wn.2d 59, 83 (2007). By utilizing
25 proximate cause, rather than justifiable reliance, the CPA's
26 causation element is distinguished from the negligent affirmative
ORDER ~ 10

1 3. Civil Conspiracy Claim

2 Defendants contend Plaintiffs cannot maintain a civil conspiracy
3 cause of action because they failed (1) to allege an underlying wrong
4 and (2) to plead the civil conspiracy cause of action with the required
5 specificity. Above, the Court found Plaintiffs sufficiently pleaded
6 both a non-per se deceptive trade practice CPA and a negligent
7 affirmative misrepresentation cause of action. Therefore, Plaintiffs'
8 civil conspiracy cause of action is based on an underlying wrong;
9 Defendants' motions are denied in part.

10 A civil conspiracy exists if "two or more persons combine to
11 accomplish an unlawful purpose or *combine to accomplish some purpose*
12 *not in itself unlawful by unlawful means.*" *Corbit v. J.I. Case Co.*,
13 70 Wn. 2d 522, 529 (1967) (emphasis added). The Court finds Plaintiffs
14 sufficiently pleaded the elements and factual basis of an "unlawful
15 means" civil conspiracy cause of action. The Complaint does not "lump
16 multiple defendants together," but rather the factual sections of the
17 Complaint differentiate the Defendants and identifies the alleged
18 conduct engaged in by each Defendant. See *Swartz v. KPMG LLP*, 476
19 F.3d 756 (9th Cir. 2007). Accordingly, Defendants' motions to dismiss
20 the civil conspiracy cause of action are denied.

21 **C. Conclusion**

22 For the above-given reasons, **IT IS HEREBY ORDERED:**

23 1. Defendant Unitrin's Motion to Dismiss (**Ct. Rec. 6**) is **GRANTED**.

24 2. Plaintiffs' Motion to Dismiss Unitrin and to Permit Amendment
25 to Complaint to Substitute Financial Indemnity Company as a Defendant

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misrepresentation causation element.

ORDER ~ 11

1 (Ct. Rec. 29) is **GRANTED**. Plaintiff shall file the amended complaint
2 (Ct. Rec. 29-3) within five (5) days after this Order is entered.

3 3. Defendant Safeco's Motion to Dismiss (Ct. Rec. 12) is **GRANTED**
4 (per se CPA cause of action and related declaratory relief) **and DENIED**
5 (remainder) **IN PART**.

6 4. Defendant CCC's Motion to Dismiss (Ct. Rec. 22) is **GRANTED**
7 (per se CPA cause of action and related declaratory relief) **and DENIED**
8 (remainder) **IN PART**.

9 **IT IS SO ORDERED.** The District Court Executive is hereby directed
10 to enter this Order and furnish copies to counsel.

11 **DATED** this 11th day of June 2008.

12 _____
13 s/ Edward F. Shea
14 EDWARD F. SHEA
UNITED STATES DISTRICT JUDGE

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